Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 49

LUCKENBACH STEAMSHIP COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 12, 1929

CERTIORARI GRANTED APRIL 29, 1929

(34,073)

(34,073)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 764

LUCKENBACH STEAMSHIP COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 764

LUCKENBACH STEAMSHIP COMPANY, INC., Petitioner,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Luckenbach Steamship Company, Inc., respectfully represents:

1. Your petitioner September 28, 1927, presented its petition to the Court of Claims praying for an award of $30,370.94 for carrying the mails in vessels of United States registry from the port of New York to ports of Panama or the Canal Zone and from ports of Panama or the Canal Zone to New York or other port within the United States.

The claim was not based on any formal written contract but was predicated on performance of the services at the request or order of the Postmaster General, followed by the approval by him of the accounts for such performance, aggregating over the period December 1, 1925, to June 1926, inclusive, $82,851.62. Said accounts were based upon a continued course of business existing for a period of years and [fol. 2] continuing to December 1, 1925, by which such mails were to be transported and paid for at the rate prescribed by Section 4009 of the Revised Statutes "for transporting mail between the United States and any foreign port, or between ports of the United States touching at a foreign port," etc.

Said approved accounts were revised and reduced by the General Accounting Office to $52,480.68, or $30,370.94 less than the aggregate sum approved by the Postmaster General.

This suit is for the recovery of the balance of the amount approved by the Postmaster General.

The conclusion of the Court of Claims was that the plaintiff is not entitled to recover. The grounds for so holding are stated in the opinion of the court delivered February 4, 1929, by Judge Sinnott, and are as follows:

1. That the Panama Canal Zone is a part of the United States and that transportation of mails thereto and therefrom is not transportation of mails to any foreign port or place.

2. That insofar as the claim is based on the approval of the accounts by the Postmaster General, irrespective of whether the same was to a foreign or domestic port or place, the plaintiff had offered no evidence of the value of the services.

Your petitioner therefore prays for the issuance of a writ of certiorari to review the judgment of the Court of Claims as involving the following questions:

1. Whether the Canal Zone and the ports and harbors thereof are "foreign" or "domestic" within the true intent and meaning of the Revised Statutes of the United States, Section 4009, and other laws of the United States applicable thereto.

[fol. 3] 2. Whether a course of business extending over a period of years and continuously to December 1, 1925, and payment in accordance therewith, can be departed from by the United States without new agreement or notice, consistently with the good faith of the Government.

3. Whether the approval by the Postmaster General of accounts for carrying the mails is conclusive upon the accounting officers and the courts, especially in the absence of any evidence contradicting the same.

4. Whether the act of July 3, 1926, c. 793, "An Act To amend Section 4009 of the Revised Statutes" (44 Stat. 900) is a declaratory act placing a construction on the meaning of existing laws as well as amending it for the future.

George A. King, William B. King, George R. Shields,
Attorneys for Petitioner.

[fol. 4] [Endorsed:] Supreme Court of the United States, October Term, 1928. No. —. Luckenbach Steamship Co., Inc., Petitioner, v. The United States. Petition for writ of certiorari to the Court of Claims. Filed by George A. King, William B. King, George R. Shields, Attorneys for Petitioner in the Court of Claims.

[fol. 1] IN THE COURT OF CLAIMS

No. H-383

LUCKENBACH STEAMSHIP COMPANY, INC.,

v.

THE UNITED STATES

I. PETITION—Filed September 28, 1927

To the Honorable the Court of Claims:

The plaintiff, Luckenbach Steamship Company, Incorporated, respectfully represents:

I. It is a corporation organized under the laws of the State of Delaware, with principal office and place of business in the City of New York, State of New York.

II. Plaintiff owns and operates, and for a long time has owned and operated, a fleet of merchant vessels duly registered under the laws of the United States and flying the flag of the United States, employed principally in the coastwise and Isthmian trade of the United States. It maintains and has maintained a systematic and regular schedule of sailings between various ports on the east coast and various ports on the west coast of the United States, by way of the Panama Canal. It maintained such service and had such sailings during all of the period hereinafter stated.

[fol. 2] III. For a long time prior to December, 1925, the Foreign Mails Department of the United States Post Office at the Cities of New York, Philadelphia, New Orleans, San Diego, San Pedro, San Francisco and other

cities and ports, both of the east and west coasts of the United States, acting by authority of the Postmaster General, had tendered for transportation, and the plaintiff had accepted and transported, certain classes and kinds of mails of both foreign and domestic origin for transportation and delivery between ports of the United States and those of the Republic of Panama and the harbors thereof for delivery in the Republic of Panama, including the Canal Zone and vice versa. For the transportation of all mails so carried by plaintiff, it had uniformly been paid at the rates fixed and prescribed by the Postmaster General for the carrying of foreign mails by merchant vessels of the United States. These rates had been fixed by orders of the Postmaster General, accepted and acted upon by the plaintiff, and were so fixed from and after October 1, 1925, at eighty (80) cents per pound for first-class mail of domestic origin, eight (8) cents per pound for prints and parcel-post matter of domestic origin, twenty-six and three-tenths (26.3) cents per pound for first-class mail of foreign origin and three and five-tenths (3.5) cents per pound for prints and parcel-post matter of foreign origin, for all mails transported by it on its vessels from ports of the United States to ports of Panama and vice versa.

IV. Beginning with the month of December, 1925, there was likewise tendered it for transportation as theretofore on various of its vessels sailing from New York and other eastern ports to San Pedro and other west coast ports, and [fol. 3] from San Pedro and other west coast ports to New York and other east coast ports, mails of various kinds, including first-class mail, prints and parcel-post matter of domestic origin and closed foreign mails of the three classes all for delivery at Isthmian ports, and plaintiff accepted such mails and transported same on various of its vessels sailing from east coast to west coast ports on, to wit, December 2d, December 9th, December 10th, December 16th, December 24th, December 26th, and December 30th, 1925, January 7th, 1926, January 11th, January 13th, January 21st, January 27th, *January 27th,* February 4th, February 11th, February 13th, February 17th, February 20th, February 24th, February 28th, March 3d, March 10th, March 17th, March 24th, March 31st, April 2d, April 7th, April 14th, April 17th, April 21st, April 28th, May 5th, *May*

5th, May 12th, May 19th, May 20th, May 26th, June 2d, June 5th, June 9th, June 16th, June 20th, June 24th, and June 30th, 1926; and from the west coast to the east coast ports on, to wit, December 3d, 10th, 14th, 17th, 24th, and 31st, 1925, January 2d, 1926, 7th, 9th, 20th, 21st, 23d, 28th, 30th, February 4th, 7th, 10th, 11th, 13th, 17th, 18th, 24th, 25th, 27th, March 2d, 4th, 6th, 9th, 13th, 16th, 23d, 26th, April 1st, *1st*, 3d, 5th, 8th, 10th, 13th, 15th, 20th, 24th, 26th, 29th, May 1st, 6th, 10th, 13th, 20th, 22d, 25th, 27th, 29th, and June 3d, 5th, 10th, 17th, 19th and 24th, 1926.

The kinds and weights of mails so transported by plaintiff were in each case determined by the Postmaster General as represented at the point of shipment and accounts were prepared in the plaintiff's favor by them and approved by the Postmaster General on the basis that the mails so handled and transported were foreign mails that is to say, on the basis of eighty (80) cents per pound for first-class mail of domestic origin, and eight (8) cents per [fol. 4] pound for prints and parcel-post matter of like origin, twenty-six and three-tenths (26.3) cents per pound for first-class foreign closed mail and three and five-tenths (3.5) cents for prints and parcel-post matter of like character. The total of the accounts so prepared and approved for the period December, 1925, to June, 1926, was $82,-851.62, which was the amount correctly due and properly payable to plaintiff for the transportation of mails on said sailings at the rates prescribed by the Postmaster General for the performance of such service.

V. Said accounts, after being approved by the Postmaster General, were transmitted by the Post Office Department to the General Accounting Office for settlement. That office adopted certain arbitrary mileage rates and by the application thereof to the poundage and kinds of mails so transported by the plaintiff reduced the amount of the approved bills in the sum of $30,370.94 and issued its certificates in sums aggregating $52,480.68, leaving a balance due plaintiff of $30,370.94. Against such reduction of the amount due as agreed upon and approved by the Post Office Department, the plaintiff promptly protested, and twice demanded a reconsideration of the decision of the General Accounting Office which was in each instance

refused. Plaintiff transported and delivered the mails under reliance and on the understanding that it would be compensated therefor at the rates prescribed by the Postmaster General for the transportation, on merchant vessels of the United States, of foreign mail, and on such basis it is justly entitled to a balance for the period stated of $30,370.94, more or less, subject to more exact computation by the Post Office Department. The rates fixed by the [fol. 5] Postmaster General and herein claimed were and are just and reasonable rates for the transportation of the mails.

VI. This claim is based upon the following among other statutes and regulations:

Revised Statutes, Sec. 4009, as follows:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel any sum not exceeding the sea postage, on the mail so transported."

Section 1405, Postal Laws and Regulations. This section in the Postal Laws and Regulations 1924 is a verbatim repetition of Revised Statutes Section 4009, above quoted. This is followed by the following official note:

"In view of the provisions of the Universal Postal Union Convention the term 'sea postage' has no meaning. United States steamships receive not exceeding the whole of the postage collected on the article contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time."

Said Section 1405 was, prior to the date of the accrual of this claim, amended, effective October 1, 1925, by the addition of Paragraph 2 reading so far as material as follows:

[fol. 6] "Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exceeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially provided the sums to be allowed for the transportation of United States mails on steamships of United States registry shall be eighty (80) cents a pound for mails consisting of letters and post cards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

Act of July 3, 1926, 44 Stat. 900, entitled "An Act to amend Section 4009 of the Revised Statutes," said act being a declaratory statute intended and designed by Congress to correct a misconstruction of Section 4009 of the Revised Statutes by the General Accounting Office.

VII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way [fol. 7] voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims $30,370.94.

King & King, Attorneys for Plaintiff.

Duly sworn to by Paul Kuhne. Jurat omitted in printing.

[fol. 8] II. General Traverse—Filed Nov. 5, 1927

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On December 12, 1928, this case was argued and submitted on merits by Messrs. George A. King and George R. Shields, for the plaintiff, and by Mr. Louis R. Mehlinger, for the defendant.

[fol. 9] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Sinnott, J.**—Filed February 4, 1929

This case having been heard by the Court of Claims upon an agreed statement of facts, signed in behalf of plaintiff by King & King, its attorneys, and in behalf of defendant by Assistant Attorney General Herman J. Galloway, and Louis R. Mehlinger, attorney for defendant, the court makes the following

Special Findings of Fact

I

The plaintiff is a corporation under the laws of the State of Delaware, with its office and principal place of business in the city of New York, State of New York.

II

The plaintiff owns and operates and for a long time has operated, under United States registry, a number of steamships, with regular sailings to and from ports on the east coast of the United States, via the Panama Canal, from and to ports on the west coast of the United States. It operated

such lines and maintained such sailings prior to, during, and since the period December, 1925, to June, 1926, inclusive.

III

Section 1405, Postal Laws and Regulations, edition 1924, with the official note thereto, together with the amendment thereof, effective October 1, 1925, are as set forth in Paragraph VI of the petition, viz.

Section 1405, Postal Laws and Regulations:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign part, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland [fol. 10] postage; and if by a foreign steamship or by a sailing vessel any sum not exceeding the sea postage, on the mail so transported."

This section in the Postal Laws and Regulations, 1924, is a verbatim repetition of Revised Statutes, section 4009. This is followed by the following official note:

"In view of the provisions of the Universal Postal Union Convention the term 'sea postage' has no meaning. United States steamships receive not exceeding the whole of the postage collected on the articles contained in the mails conveyed by said vessels; and foreign vessels are paid any sum not exceeding the rate of postage fixed for a single maritime transit by the Universal Postal Union Convention in force at such time."

Said section 1405 was, prior to the date of the accrual of this claim, amended, effective October 1, 1925, by the addition of paragraph 2, reading so far as material, as follows:

"Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exceeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially pro-

vided the sums to be allowed for the transportation of United States mails on steamships of United States registry shall be eighty (80) cents a pound for mails consisting of letters and post cards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

IV

The Postmaster General, acting through the Foreign Mails Department of the Post Office of New York City, had for a period of years and continuously to December 1, 1925, tendered to the plaintiff and the plaintiff had accepted for transportation and transported mails of the United States and foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama. For the transportation of all mails so consigned, transported, and delivered the plaintiff was, on the approval of the Postmaster General, paid at the rates prescribed by the Postmaster General for transportation by United States steamships of mails between the United States and a foreign port.

V

During the period December, 1925, to June, 1926, inclusive, there were delivered to United States vessels operated by the plaintiff, accepted by it for transportation, and transported and delivered by it large quantities of [fol. 11] mails of the United States of various classes for transportation to and delivery at ports at the Panama Canal and/or from ports at the canal to ports in the United States.

VI

The transportation of mails as set forth in Finding V, if properly to be paid for at the rates prescribed by the

Postmaster General for the transportation of United States mail on vessels of the United States between ports of the United States and foreign ports, was worth, and the plaintiff should have been allowed and paid therefor, a total of $82,851.62 for the transportation so involved. For said service the Postmaster General prepared and approved invoices or vouchers aggregating the sum stated, but the General Accounting Office, to which the approved accounts were sent for direct settlement, revised the same to aggregate $52,480.68, or $30,370.94 less than the aggregate sum approved by the Postmaster General, and the plaintiff has received and been paid for the service described only the amounts so allowd by the General Accounting Office.

The action of the General Accounting Office in allowing and paying the lesser amount, and not the amount as approved by the Postmaster General, was the result of a conclusion by it that the applicable rate for the transportation of such mails was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions which, for the period involved, it was concluded, was to be fixed only by contractual agreement in accordance with law, and, there being no contract covering such service it was held that the plaintiff was entitled only to a reasonable compensation for such service, which the General Accounting Office determined by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions to be $52,965.41.

VII

Since July 1, 1926, plaintiff has carried mails of the United States, on vessels of United States registry, between ports of the United States and ports of the Panama Canal Zone for which it has been allowed and paid at the rates prescribed by the Postmaster General for the transportation of mails on United States vessels between the ports of the United States and foreign ports.

Payments after July 1, 1926, at the increased rates prescribed for the transportation of mail between ports of the United States and foreign ports was made pursuant to the provisions of the act of July 3, 1926, 44 Stat. 900, which was construed as not being retroactive.

VIII

If the transportation performed by the plaintiff during the period from December, 1925, to June, 1926, inclusive, as hereinbefore described was properly to be classed as it had been classed before December, 1925, as stated in Finding IV, at the rates prescribed by the Postmaster General for transportation between ports of the United States and [fol. 12] a foreign port, there is due plaintiff for the services performed during the period December, 1925, to June, 1926, a balance of $30,370.94.

CONCLUSIONS OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and therefore the petition is dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

SINNOTT, Judge, delivered the opinion of the court:

This is a suit for the recovery of the sum of $30,370.94 which the plaintiff claims is the difference between the amount certified by the Postmaster General for transportation of various classes of mails of the United States between ports of the United States and the Canal Zone during the period December, 1925, to June, 1926, and the amount allowed and paid by the General Accounting Office for said services. As had been done prior to December 1, 1925, by the Postmaster General, the amount certified for said services was based upon the compensation or rates prescribed by him as being applicable for the transportation of mails by American vessels between the United States and a foreign port.

The General Accounting Office concluded that the rate payable for said services for the period involved was that applying to ocean transit of United States mail or foreign closed mail between the United States and its possessions,

which was to be fixed by contractual agreement in accordance with law. In the absence of a contract covering such services the General Accounting Office held that the plaintiff was entitled to a reasonable compensation which was determined by comparison with compensation being paid under contracts for transportation of mail between the United States and its insular possessions. This amount is $30,370.94 less than the compensation certified by the Postmaster General.

The sole question presented by the agreed statement of facts in this case is whether for the transportation of mails between ports of the United States and the ports in the Panama Canal Zone during the period December, 1925, to June, 1926, the plaintiff is entitled to be paid at rates applicable to the transportation of mails between the United States and a foreign port.

The authority to pay the rates contended for by the plaintiff is found in section 4009 of the Revised Statutes, which is as follows:

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation if by a United States steamship, any sum not exceeding the sea and United States inland postage; and if by a foreign steamship or by a sailing vessel, [fol. 13] any sum not exceeding the sea postage, on the mail so transported."

The question presented for decision is whether or not the ports within the Panama Canal Zone are foreign ports within the meaning of said section 4009 of the Revised Statutes.

Defendant's very comprehensive and able brief refers in detail to the various pertinent acts of Congress, the treaty with Panama relating to the Canal Zone, and the Executive Orders of the President relating thereto, and gives the court a very clear elucidation thereof, of which we are glad to make copious use.

The President of the United States was authorized to acquire for and on behalf of the United States perpetual control of a strip of land extending from the Caribbean Sea to the Pacific Ocean, and the right to use the waters thereon, and to excavate, construct, and perpetually to maintain,

operate, and protect thereon a canal, and jurisdiction over said strip and the ports at the ends thereof, to make such police and sanitary rules and regulations as shall be necessary to preserve order and the public health thereon, and to establish such judicial tribunals as may be necessary to enforce such rules and regulations, and for that purpose there was created the Isthmian Canal Commission. (Act of June 28, 1902, c. 1302, 32 Stat. 481.)

Pursuant to the above authority a treaty between the United States and the Republic of Panama to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific Oceans was concluded and signed at Washington on the 18th day of November, 1903. This treaty was ratified, and proclaimed by the President of the United States on the 26th day of February, 1904. (Treaties and Acts of Congress Relating to the Panama Canal, 1917.)

The parts of said treaty to be considered in the determination of this controversy are as follows:

"Article II

"The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. * * *

"Article III

"The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and

[fol. 14] described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

Pursuant to the ratification of the treaty with the Republic of Panama the President was authorized to take possession of and occupy on behalf of the United States the territory since known as the Canal Zone. (Act of April 28, 1904, c. 1758, 33 Stat. 429.) By section 2 of said act it was provided that until the expiration of the Fifty-eighth Congress, unless provision for the temporary government should sooner be made by the Congress, all military, civil, and judicial powers, as well as the power to make rules and regulations necessary for the government of the Canal Zone, and all rights, powers, and authority granted by the terms of the treaty between the United States and the Republic of Panama should be vested in such person or persons and should be exercised in such manner as the President should direct for the government of said zone, and maintaining and protecting the inhabitants thereon in the free enjoyment of their liberty, property, and religion. Acting under the authority granted in said acts the President in his Executive order of May 9, 1904, stated:

"I have taken possession of and now occupy, on behalf of the United States, the Canal Zone and public land ceded by the Republic of Panama.

* * * * * * *

"If there now be in force within the Canal Zone any franchise granting to any person or persons a privilege to maintain lotteries or hold lottery drawings or other gambling methods and devises of a character forbidden by the laws of the United States, or if the grantee of any such privilege has now the right to sell lottery tickets or similar devices to facilitate the business of the concessionaire, the commission shall enact laws annulling the privileges or concessions and punishing future exercise of the same by imprisonment or fine, or both." (Panama Canal—Executive Orders, 1904-1921, pp. 21, 25.)

Under authority of said Executive order, there was enacted by the Isthmian Canal Commission a code of laws for the government of the Canal Zone. (Laws of Canal Zone, 1904-1914, Annotated 1921; Code of Civil Procedure, Canal Zone, 1907.) Under said statutes and Executive orders the commission exercised general governmental authority until March 31, 1914, when it ceased to exist and was succeeded by the permanent organization authorized by the Panama Canal act. (Act of August 24, 1912, c. 390, 37 Stat. 560.) By section 2 of the latter act all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the zone and the construction of the canal were ratified and confirmed as valid and binding until Congress should otherwise provide.

At the time the act took effect there was a judicial establishment in the zone which had been set up under Act No. 1 of the Isthmian Canal Commission. By this act the judicial [fol. 15] power of the government of the Canal Zone was vested in a supreme court, circuit courts, and municipal courts.

Prior to the passage of the Panama Canal Act the government of the Canal Zone was wholly an executive matter. All powers, executive, legislative, and judicial, were vested in the President. He alone, or through those acting by his authority, made, amended, and repealed laws, created and abolished courts, appointed and removed officials, and generally exercised absolute power over the zone. By Executive order of April 2, 1907, the powers of the governor or chief executive of the zone were vested in the chairman of the commission. Upon completion of the canal this order was changed. Congress assumed the legislative power. While many matters were still left to be regulated by the President, by section 2 of the Panama Canal Act the power formerly possessed by the President was abrogated. By section 4 of the act the President, when in his judgment the canal should be sufficiently advanced to render further services of the Canal Commission unnecessary, was authorized to discontinue the commission and complete, govern, and operate the canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor and such other persons as he might deem competent to dis-

charge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. He was authorized to appoint, by and with the advice of the Senate, a governor at a salary of $10,000 per annum. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the canal and Canal Zone were to be appointed by the President or by his authority, removable at his pleasure, and the compensation of such persons was to be fixed by him or by his authority, until Congress should by law regulate the same. (37 Stat. 561.)

By section 7 of the act, as amended by the act of September 21, 1922 (c. 370, 42 Stat. 1004), the authority of the governor was defined as follows:

"That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this act otherwise provided, all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law."

Under various provisions of the law now contained in Title 48 of the United States Code, the President is authorized to grant leases of public lands in the zone (section 1308); to make rules and regulations in matters of sanitation, health, and quarantine (section 1310); to make and change rules and regulations for levying, assessing, and collecting ad valorem, excise, license, and franchise taxes (section 1311); to make and enforce rules and regulations for the public roads and highways and for regulating, licensing, [fol. 16] and taxing the use and operation of automobiles (section 1312); to make rules and regulations to assert and exercise the police power in connection with breaches of the peace or disorderly, indecent, or immoral conduct within the zone (section 1313); to make regulations for the operation of the canal and the locks and approaches thereto

(section 1318); to provide a method for adjustment of claims arising out of personal injuries to employees (section 1320); to make rules and regulations touching the right of persons to enter or remain upon or pass over any part of the Canal Zone (section 1321); to erect, maintain, and operate radio communications, dry docks, repair shops, yards, docks, wharves, etc., and all moneys received from such operations shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States (section 1323); to determine what towns shall exist in the Canal Zone and to subdivide said zone into subdivisions to be designated by name or number and to clearly define their boundaries (section 1341).

In the place of the courts created by the President, acting through the commission, Congress created and established courts and defined their jurisdiction. (Act of September 21, 1922, c. 370, section 1, 42 Stat. 1004.) The jurisdiction in admiralty is the same as is now exercised by the United States district judges and the United States district courts, and the practice and procedure in admiralty is the same as in the United States district courts. (Section 8, Panama Canal act, as amended by act of 1922, section 2, 42 Stat. 1005.) The Circuit Court of Appeals of the Fifth Circuit has jurisdiction to review final judgments of the district courts in all cases in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds $1,000: in felony cases, and in cases in which the jurisdiction of the trial court is in issue. (42 Stat. 1006; Theoktistou v. Panama Railroad Company, 6 Fed. (2d) 116.) Such appellate jurisdiction is subject to review by the Supreme Court of the United States, as in other cases, and is exercised by the Circuit Court of Appeals in the same manner as in reviewing final judgments of the district courts of the United States. The district judge, district attorney, and the marshal are appointed by the President by and with the advice of the Senate of the United States for a term of four years each, and until their successors are appointed and qualified. (42 Stat. 1006.)

In the various acts of Congress the Canal Zone has been referred to as "Territory of the United States." In the act relating to the liability of common carriers by railroad to their employees, it is provided:

"That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, * * *". (Act of April 22, 1908, c. 149, section 2, 35 Stat. 65.)

In the act known and referred to as the "White Slave Traffic Act," it is provided "That the term 'Territory' as used in this act, shall include the district of Alaska, the insular possessions of the United States and the Canal [fol. 17] Zone." (Act of June 25, 1910, c. 395, section 7, 36 Stat. 827.) In the act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government thereof, it was enacted:

"That all laws and treaties relating to the extradition of persons accused of crime in force in the United States, * * * and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States." (Act of August 24, 1912, c. 390, Section 12, 37 Stat. 569; U. S. Code, Title 48, section 1330.)

In the national defense act relating to the number of the National Guard of the United States, it was enacted that "Provided further, That the word Territory as used in this act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, * * *." Act of June 3, 1916, c. 134, section 62, 39 Stat. 198.) Congress has enacted that in defining terms the words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of March 4, 1917, c. 180, 39 Stat. 1193.) In section 1 of Title XIII, General Provisions, of the espionage act, it is enacted that the term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of June 15, 1917, c. 30, 40 Stat. 231.) The

words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof. (Act of October 6, 1917, c. 106, 40 Stat. 412.) The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States. (Act of April 20, 1918, c. 59, 40 Stat. 534.) The term "United States" as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States. (Act of May 22, 1918, c. 81, 40 Stat. 559.) The term "United States" includes any State, Territory, or District of the United States, the insular possessions, the Canal Zone, and all lands or waters subject to the jurisdiction of the United States. (Act of July 18, 1918, c. 157, 40 Stat. 913.) The provisions of the national prohibition act were made applicable to the Canal Zone. (Act of October 28, 1919, c. 85, section 20, Title III, 41 Stat. 322.) In the act to regulate the entry of aliens into the United States, Congress provided: "That the term 'United States' as used in this act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States." (Act of November 10, 1919, c. 104, section 3, 41 Stat. 354.)

By executive order of December 5, 1912, the President of the United States by virtue of the authority vested in him by section 3 of the Panama Canal Act of 1912 (37 Stat. 561) declared all land and land under water within the limits [fol. 18] of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Isthmian Canal Commission to take possession, on behalf of the United States, of all such land and land under water and to extinguish, by agreement when practicable, all claims and titles of adverse claimants to the occupancy thereof. (Panama Canal—Executive Orders 1904-1921, p. 132.) Subsequently, Congress passed an act removing a certain tract or lots of land situated in the town of Cristobal in said Canal Zone, and authorized the Panama Canal Railroad Company to sell, transfer, and convey said lots or tracts of land with all improvements thereon to any person or persons or associations of persons and retain the

consideration therefor for its own use. (Act of June 5, 1920, c. 231, 41 Stat. 948.) In the act relating to the landing and operation of submarine cables in the United States it is provided, that the term "United States" as used in this act includes the Canal Zone, the Philippine Islands, and all territory, continental or insular, subject to the jurisdiction of the United States. (Act of May 27, 1921, c. 12, section 5, 42 Stat. 8.)

The plaintiff's contention that "The Canal Zone is no part of the United States," but that it is "foreign" within the meaning and intent of the laws of the United States, is not supported by the provisions of Articles II and III of the treaty between the United States and the Republic of Panama.

The treaty under which the United States acquired in perpetuity the use, occupation, and control of the Canal Zone, granted to and vested in the United States forever all the rights, power, and authority in and over said strip of land and lands under water which it could possess as the sovereign thereof to the entire exclusion of the exercise of any such sovereign rights, powers, and authority thereover by the Republic of Panama.

A grant, as used in a treaty, comprehends not only those concessions which are made in form but also any concession, warrant, order, or permission to survey, possess, or settle, whether evidenced by writing or parol, or presumed from possession. (Strother v. Lucas, 12 Pet. 410, 435; Bryan v. Kennett, 113 U. S. 179, 192.)

A grant in its own nature amounts to an extinguishment of the rights of the grantor, and implies a contract not to reassert those rights. (State of Illinois v. Illinois Central Railroad Company, 33 Fed. 730-774.)

In all governments of constitutional limitations sovereign power is manifested in three ways: (1) By exercising the right of taxation; (2) by exercising the right of eminent domain; (3) through its police powers. It has been shown that all of these powers have been exercised by the executive and legislative branches of the Federal Government, and the question of whether or not the Canal Zone is a possession of the United States has been definitely determined and the courts are bound by that determination.

Sovereignty is a political question. In Jones v. United States, 137 U. S. 212, it is said that the question of "who is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. [fol. 19] This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." (See also Pearch v. Stranahan, 205 U. S. 265, 273.)

The plaintiff also contends that because certain officers of the United States have for a long time considered and treated the Canal Zone as "foreign" that construction should not now be disturbed. In answer to this contention, we think it sufficient to say that the fact that certain officials of the United States have dealt with the Canal Zone on a basis which does not recognize it as a possession of the United States and treat it as anything but a possession of the United States is not conclusive of its status as a territorial possession of the United States. It is true that beginning with the decision in Downes v. Bidwell, 182 U. S. 244, the Supreme Court has drawn a distinction in the application of the Constitution and Federal statutes between the organized territory of the United States and its possessions, and has in effect held that the Constitution and general statutes may not apply to its "possessions," or that they have a different application to its "possessions" than they have to the "territory of the United States." Consequently, various statutes, the enforcement of which is particularly within the jurisdiction of certain officers, may be so construed as in effect to treat a "possession of the United States" on the basis of "foreign" territory merely because it is neither affirmatively or impliedly included in the particular statute, or statutes may be properly enacted which effectively deal with such possessions on a distinctly different basis from that of the United States or of its territory. It can not be conceded, however, that these circumstances necessarily establish that the Canal Zone is not a possession of the United States, because, as has already been pointed out, Congress has enacted various statutes specifically applicable to the Canal Zone and which deal with it as a "possession of the United States."

There can be no question that the Canal Zone was acquired and is held by the United States under a perpetual grant which for all practical purposes conferred upon and vested in the United States all the rights, power, and authority of a sovereign, and that the United States has exercised full sovereign rights over the Canal Zone ever since the strip of land was acquired.

We think that it must be admitted that all doubt as to the character of the title of the United States in and to the Canal Zone has been conclusively removed by the decision of the Supreme Court in the case of Wilson v. Shaw, 204 U. S. 24, where it was contended that the United States had no power to construct the Panama Canal because the Canal Zone was no part of the territory of the United States. Mr. Justice Brewer, speaking for the Court (pp. 32 and 33), said:

"Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, 'grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the con-[fol. 20] struction, maintenance, operation, sanitation, and protection of said canal.' By Article 3, Panama 'grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement, * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.'

"Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of the canal. *It is hypercritical to contend that the title of the United States is imperfect,* and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate." (Italics ours.)

It is clear from what has been before stated that the Canal Zone under the treaty with the Republic of Panama became and is a possession of the United States, which has always exercised and is now exercising all the powers and rights of sovereignty in the Canal Zone as are being exercised in all of the territory or possessions which are under the control and jurisdiction of the United States, and that ever since it was acquired the Canal Zone has been considered and treated by the legislative branch of the Government as a possession of the United States, and that therefore the Postmaster General was not authorized to pay compensation based upon rates applicable to transportation of mails between the United States and a foreign port, under section 4009, supra, of the Revised Statutes.

The plaintiff further contends that because the Postmaster General for a long time prior to December 1, 1925, had construed section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails between the United States and a foreign port, such construction should not now be disturbed, "especially when so to do would savor of bad faith and a violation of contract rights." We think the answer to this contention is that an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. (Pierce v. United States, 1 C. Cls. 270; The Floyd Acceptances, 7 Wall. 666.) In the case of Houghton v. Payne, 194 U. S. 88, it is stated (pp. 99-100) that—

"* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219; United States v. Finnell, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute."

Section 4009 of the Revised Statutes was amended by the act of July 3, 1926. (44 Stat. 900.) Plaintiff contends that the above act, amending section 4009, Revised Statutes, [fol. 21] should be construed as a declaratory statute, making clear the meaning of section 4009, Revised Statutes. In other words, that the amendatory act was retroactive. It is well settled that statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears. United States v. Magnolia Petroleum Company, decided February 20, 1928, 276 U. S. 160, wherein the Court said:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

Also in White v. United States, 191 U. S. 545, wherein it is said:

"Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past.

We cannot accept the explanation that the act of July, 3, 1926, supra, amending section 4009 of the Revised Statutes, was an elucidation of said section, and not an addition to it, as claimed by defendant, but we regard it as a declaration of a new purpose and not the explanation of an old one. Our view is that the amendatory act makes specific provision for the casus omissus in said section 4009, Revised Statutes. See Smietanka v. First Trust & Savgs. Bank, 257 U. S. 602; also Shwab v. Doyle, 258 U. S. 529.

Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the

compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff can not recover the amount claimed in this case or any other sum.

It is therefore ordered and adjudged that plaintiff's petition be dismissed.

GREEN, Judge; MOSS, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

[fol. 22] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 4th day of February, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,073. Court of Claims. Term No. 764. Luckenbach Steamship Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed March 12th, 1929. File No. 34,073.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed:] Supreme Court of the United States, October Term, 192–. Order granting petition for certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

LUCKENBACK STEAMSHIP COMPANY, INC.,

v.

THE UNITED STATES.

No. 764.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

The claim involves the recovery of the balance of an account approved by the Postmaster General in favor of this company for carrying the mails between the Port of New York and the Isthmus of Panama for the period December 1, 1925, to June, 1926. There was no formal written contract. The accounts were approved by the Postmaster General in the amount of $82,851.62. They were revised and reduced by the General Accounting Office to $52,480.68. This suit is for the recovery of the balance, $30,370.94.

It is based upon the following grounds:

1. That the Canal Zone and its ports and harbors come within the designation of a "foreign port" as defined by Section 4009 of the Revised Statutes of the United States, quoted in petition par. VI, R. 6.

2. That whether that construction be originally sound or not, the course of business between the United States and the company "for a period of years and continuously to December 1, 1925" (Finding IV, R. 10), had treated it as such and the company had for all such services up to that time been paid on the approval of the Postmaster General at the rates prescribed "for transportation by United States steamships of mails between the United States and a foreign port," and that construction should not be departed from.

3. That the approval of the Postmaster General of accounts for carrying mails on his order in the absence of a formal written contract is *prima facie*, if not conclusive, evidence of the value of the services and should be paid for as such in the absence of any evidence to the contrary.

4. That the act of July 3, 1926, c. 793, 44 Stat. 900, "to amend Section 4009 of the Revised Statutes," so as to allow compensation as herein claimed for services in such transportation of mails not only made law for the future, but was a declaratory statute intended to confirm the long-standing construction of Section 4009 of the Revised Statutes by the Post Office Department, with the full acquiescence and sanction of the accounting officers—a construction interrupted only for the short period of seven months covered by the present claim.

These grounds of claim were all overruled by the Court of Claims in an elaborate opinion delivered by Judge Sinnot (R. 12) and judgment rendered dismissing the petition (R. 26).

GROUNDS FOR CERTIORARI.

1. Status of Canal Zone.

Section 4009 of the Revised Statutes as originally enacted provides certain compensation "for transportation of mails between the United States and any foreign port," etc.

Up to December 1, 1925, "mails of the United States and

foreign mails for the United States consigned to the Port of Colon, Republic of Panama, and to the Canal Zone of the United States over the Isthmus of Panama" (Finding IV, R. 10) had been paid for at the rates prescribed by Section 4009 "for transportation by United States steamships of mails between the United States and a foreign port."

The status of the Canal Zone is thus involved.

The articles of the Panama Canal Treaty quoted in the opinion of the court (R. 14) are treated in a learned article by Lester H. Woolsey in the American Journal of International Law, Vol. 20, 1926, pp. 117 to 124. He says:

"It may be observed in the second place from Article III itself that it in terms does not transfer full and complete sovereignty to the United States. There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama. On this point Mr. Taft, then Secretary of War, stated before the Committee on Interoceanic Canals, April 18, 1906, that:

"'It (Article III) is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it should have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen of Ohio once characterized as a "barren ideality," but to the Spanish or Latin mind, poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms, it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words "Canal Zone".'

"In the first place, Article II is not an absolute cession, conveyance or transfer of territory. If this had been the intention, no doubt a simple form of cession of territory and dominion would have been employed, as was done in the case of the Louisiana Purchase (Treaty with France, 1803, 8 Stat. 200), and the Alaska Purchase (Treaty with Russia,

1867, 15 Stat. 539), with a provision added as to the allegiance of the inhabitants. Article II is a grant to the United States of the 'use, occupation and control' for a specified purpose and does not purport to convey absolute title. The United States could not sell or transfer the zone or any part of it, because she has not complete title in fee."

Mr. Woolsey concludes (p. 123):

"that it was doubtless not the intention of either party that the United States should hold and administer the Canal Zone as an independent colony or possession of the United States."

True, the opinion of the court points out that Congress exercises complete control over the Canal Zone. This is provided for in the treaty.

While it is true, as pointed out in the opinion of the Court of Claims, that the national prohibition act extends to the Canal Zone, it is also true as pointed out in *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, 127, 128, that "liquor in transit through the Panama Canal or on the Panama Railroad" is specially exempted.

In 1911, Attorney General Wickersham (29 Opns. 194) put a construction on "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, 26 Stat. 830.

He states the question to be: "whether the ports of Colon and Panama will, after the canal is constructed, remain foreign ports."

He answers this question (p. 197):

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its inclosures and projections of land where ships take refuge and seek shelter.

"Construing the word 'port' as synonymous with 'harbor,' the vessels unquestionably would be carrying the mails

to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

A letter of the Postmaster General dated July 23, 1926, addressed to the petitioner (original on file in the Court of Claims), states:

"that this department has always considered service to the Canal Zone as being in the same category as that to a foreign country and has stated the compensation on that basis," etc.

5 Comp. Gen. 647 says (p. 648):

"It appears from the foregoing that Congress has generally treated the Canal Zone as 'foreign' to the United States, any exception being for specified purposes only."

2. Effect of Long-Continued Construction.

The construction thus adopted by the Attorney General in 1911 that carrying the mails from New York to the Isthmus of Panama was carrying "foreign" mails should be determinative against a sudden departure from that rule made by the General Accounting Office in opposition to the views of the Postmaster General.

The Attorney General's construction was given in 1911. It was acted on up to December 1, 1925.

The rule in such a case is stated in *United States* v. *Alabama Great Southern Railroad*, 142 U. S. 615, 621:

"We think the contemporaneous construction thus given by the executive department of the government and continued for nine years through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in

this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

The latest statement of the rule is in *United States* v. *Minnesota*, 270 U. S. 181, 205 (opinion by Mr. Justice Van DeVanter).

3. Postmaster General's Approval of Accounts.

By Finding VI (R. 11) "For said service the Postmaster General prepared and approved invoices or vouchers aggregating the sum stated," etc.

This suit is for the amount of the vouchers approved by the Postmaster General. Without regard to whether the service was foreign or domestic, it should be paid for at the rate fixed by the Postmaster General. The Court of Claims at the end of its opinion criticises plaintiff for not offering independent evidence of the value of the services, saying (R. 25, 26):

"In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service."

The true rule is the contrary. These vouchers were not only approved by the Postmaster General; they were prepared in his office. The vouchers described in the findings of fact as approved by the Postmaster General constitute

the highest evidence of the value of the service. The Postmaster General is charged by law with all the duties touching the transportation of the mails of the United States. By Revised Statutes, Section No. 396, Par. 9th, "It shall be the duty of the Postmaster General" "to superintend the general business of the department and execute all laws relative to the postal service." He may, and frequently does, order the performance of service without any formal contract. He also approves such service after it has been rendered and fixes the compensation for the same. When he does so, the presumption is very strong that the amount fixed by him for the value of the service is correct.

In *Salomon* v. *United States,* 19 Wall. 17, this court held (p. 20):

"when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Much more strongly does this rule apply where it is a head of a department certifying to the value of services rendered at his request without any formal contract.

In this case, as in *St. Louis, Brownsville & Mexico Railway Co.* v. *United States,* 268 U. S. 169, 177, it may be said:

"The claim here in question was for an amount fixed by the tariff. A bill for the full sum was presented to the appropriate officer. The deduction made by the Auditor was without warrant in law."

The rule is elementary in the jurisprudence of the Court of Claims and was thus stated by Chief Justice Richardson, who had been Secretary of the Treasury, in *McCann* v. *United States,* 18 C. Cls., 445, 447:

"A voucher given by an officer of the Government, in the

regular and ordinary course of his business, for services performed or articles purchased by his order for the public service within the scope of his authority and the line of his duty unimpeached, is *prima facie* evidence of indebtedness on the part of the United States as therein stated."

Under this very provision of Revised Statutes, Section 4009, the action of the Postmaster General in fixing the rate was held conclusive in *Pacific Mail Steamship Co.* v. *United States,* 28 C. Cls. 1.

The amount fixed by the Postmaster General for the services was therefore conclusive.

4. Act of 1926 Declaratory.

The act of July 3, 1926, c. 793, 44 Stat. 900, "An Act to amend Section 4009 of the Revised Statutes," provided "That Section 4009 of the Revised Statutes is amended to read as follows:"

The amendment restored the old construction. Thus from at least the time the Attorney General gave his opinion in 1911 until December 1, 1925, these mails were carried on the basis claimed by the petitioner in this case, and Congress at the first opportunity after learning of the decision of the Comptroller General to the contrary, restored the rule that had been prevailing under the Attorney General's opinion of 1911.

The report of the Committee on Post Office and Post Roads of the House of Representatives on the bill (House Report No. 1305, 69th Congress, 1st Sess.) refers to the decision and disapproves it:

"If the Comptroller's decision went into effect under the present law it would be necesary to advertise the mail to our insular possessions and war vessels and be given to the lowest bidder, etc., and make a formal contract. Under the foreign mail arrangement, the Post Office Department just offers it to any boat that is ready to go out at any time the mail is ready to go, and such boats carry it at the pound

rate without any contract at all. It would also cause two classes of mail and a domestic rate for each."

The act of 1926 is thus more in the nature of a declaratory law.

As said in a still later report made in 1928, House Report No. 1788, 70th Congress, 1st Sess., speaking of the act of 1926:

"The purpose of the act was not to reduce the rates paid to American ships, but to clarify the law."

A statute in similar terms was so construed by this court in *Bailey* v. *Clark*, 21 Wall. 284, 288:

"This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising, it would undoubtedly have so provided in terms."

These statutes are entitled to the most liberal possible construction. Revised Statutes, Section 4009, and its amendment of 1926, should be construed in the light of the public policy declared by other acts. The Merchant Marine Act of 1920, approved June 5, 1920, c. 250, Sec. 1, 41 Stat. 988, and confirmed by the Merchant Marine Act of 1928, approved May 22, 1928, c. 675, Sec. 1, 45 Stat. 689, declare it to be the public policy of the United States to do whatever may be necessary to develop and encourage the maintenance of a merchant marine.

CONCLUSION.

This writ of certorari is properly allowable as involving important questions:

1. The status, national and international, of the Canal Zone.

2. A departure from a long continued statutory construction on the faith of which rights had been built up.

3. The credit due to vouchers and statements of account prepared and approved by the Postmaster General for the carriage of mails.

4. The action of Congress in enacting a statute clarifying and declaring the meaning of an earlier statute by reverting to the long continued construction.

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